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SCHUCKING OFF THE RIGHTS OF THE AGED: CONGRESSIONAL AMBIVALENCE AND THE EXCEPTIONS TO THE AGE DISCRIMINATION ACT OF 1975

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Peter Schuck's masterful article *The Graying of Civil Rights Law*¹ has so articulately captured the legislative history of the Age Discrimination Act² and so aggressively provided an apology for it that his work, whose focus is the exceptions embodied in that statute, serves as both a natural target and focal point of this paper.

Discussing the exceptions that make an uninspired Act more dreary is not the most exciting task. It is necessary, nonetheless, since the exemptions crystallize the dearth of advantage provided by this law. Not since the original Age Discrimination in Employment Act,³ in which Congress all but suggested mandatory retirement at age 65,⁴ has Congress so well demonstrated its desire to pay political lip service to the aged without providing them substantial benefit.

In its implementing regulations⁵ to the Age Discrimination Act, the then Department of Health, Education and Welfare,⁶ expressed this lip service philosophy very well, though presumably quite unintentionally. In describing the Act, the agency said that it did two things: It prohibited discrimination and it permitted the use of certain age distinctions.⁷ The use of age distinctions—that is discrimination based on

* Dean and Professor of Law, University of Santa Clara School of Law; J.D., University of Pennsylvania; LL.M., J.S.D., Yale. My thanks go to Tracy Rambo for her careful research assistance. I, not she, am responsible for the content of the article—especially the title.

1. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979) [hereinafter cited as Schuck].

2. 42 U.S.C. §§ 6101-6107 (1976 & Supp. III 1979) [hereinafter referred to as the ADA or the Act].

3. 29 U.S.C. §§ 621-634 (1976) amended 1978 [hereinafter referred to as the ADEA].

4. The Age Discrimination in Employment Act, as originally enacted, only protected persons age 40-65, thus freeing an employer from any liability for discriminatory actions once the employee reached the maximum age. In 1978, the Act was amended to raise its coverage to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (Supp. III 1979)).

5. 45 C.F.R. § 90 (1980).

6. In 1979 the Department of Health, Education and Welfare was disbanded and replaced by the Department of Education and the Department of Health and Human Services. Education Organization Act, Pub. L. No. 96-88, §§ 201, 301, 509, 93 Stat. 668 (1979).

7. 45 C.F.R. § 90.1 (1980).

age—is thus simultaneously prohibited and justified. To be sure, the exemptions are more narrowly cast than the broad prohibition, but in the end they threaten to swallow up the purported benefit at least as Professor Schuck would interpret them.

SCHUCK'S OBJECTIONS TO THE USE OF AGE AS A CRITERION

It is not within the scope of this paper to discuss the wisdom of prohibiting age discrimination in the manner in which racial discrimination, for example, is prohibited,⁸ but some of that discussion must be reviewed to make what follows meaningful. Professor Schuck announces himself comfortable with distinctions based on age because he believes the elderly to be less in need of legislative intervention than more traditionally protected groups. He contends:

[The] distinctive characteristics of both age as a classificatory criterion and of the ADA as a hybrid form of legislation imply a relatively limited definition of age discrimination, a definition that in turn implies an interpretation of the exception under which relatively few existing uses of age are likely to be prohibited.⁹

Schuck argues that since age distinctions are neither inherently discriminatory, nor historically suspect, the use of age as a classification criterion is entirely reasonable. He reaches this conclusion after responding to his own arguments against the use of age as a criterion, a brief summary of which is in order.

Schuck's first objection to the use of an age criterion is that it "classifies individuals on the basis of a characteristic that is immanent and inescapable to them, one suggestive of neither culpability nor demerit."¹⁰ His answer to this objection is that since, presumably, we all will experience being a particular age, "members of other age groups are surely less likely to use age rules to oppress persons whose status

8. I am flattered that, in his response to this article, Schuck, *Age Discrimination Revisited*, 57 CHI. KENT L. REV. 1029 (1981) (printed below) [hereinafter cited as *Schuck Revisited*], Professor Schuck ignores my disclaimer and continually insists on further documentation of a position that was merely outlined as background. Although the invitation is inviting, this is not the time to accept it.

Nonetheless, lest one perceive the disagreement between Professor Schuck and myself as not being fundamental to the issue of age discrimination, one should consult the Schuck Solution. Professor Schuck would deal with age discrimination by having Congress enact a rational relationship test. See *Schuck Revisited*, *supra*. That test has, of course, been traditionally applied in equal protection cases without the need for legislation. The Supreme Court has interpreted it to legitimate almost any kind of governmental action. *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Kotch v. Board of River Pilots Comm'n*, 330 U.S. 552 (1947); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

9. Schuck, *supra* note 1, at 75-76.

10. *Id.* at 32-33.

they have shared or expect to share.”¹¹ Furthermore, “using an imminent, impersonal characteristic such as age to determine one’s entitlement to benefits is less stigmatizing or damaging than doing so on the basis of a characteristic, such as maturity or employability, that reflects directly upon one’s personal merit.”¹² Compare this to the Report of the House of Representatives:

Non-involvement of older persons is traceable time and again, not to their own desires, but to a determination by the leaders of many institutions in our society to discriminate against persons as workers and as volunteers solely because they have reached a given age. They refuse to consider the merits of each case. In so doing they reflect by their deeds a deep-seated prejudice against the elderly.

Prejudices against the aged are reflected also in society’s unwillingness to provide them with services which we believe other age groups are entitled to as a matter of right.¹³

Professor Schuck’s arguments seem to slight a number of problems unique to aging. Perhaps, the most significant is that the prejudice against the elderly is psychologically deep-seated. The fact that we all age aggravates rather than softens this prejudice. Our youth culture brings with it a commitment to deny aging. As a culture, we dress youthfully; we simulate youth with cosmetics; we endearingly refer to each other as “baby.” The list is endless. Apparently, the elderly are an affront to our pretenses of youth. They are what we deny we are becoming. The fact is that classifications not based on personal merit tend to heighten, not lessen, the stigma associated with advanced age. This stigma arises from misguided concepts of aging itself which invoke feelings of powerlessness in the elderly. As one writer stated:

Aging, in the words of one student of community medicine, is commonly viewed as a biological process, “something that happens to us. Old age is a disease, biology robs us, and death is the ultimate mugger.” Viewed from this vantage, the individual emerges as a *passive victim of impersonal forces*. In truth, however, the individual is also the victim of our—and his—expectations. Over the course of a lifetime, the individual learns how an aged person “ought” to behave, and this, together with the very widespread social reinforcement, contributes to his adopting that role, incapacities and all. And the rest of us, afflicted with the natural tendency to see what we expect to see and disregard much of the remainder, usually have little difficulty in finding examples to confirm our pre-existing views.¹⁴

11. *Id.* at 33.

12. *Id.* at 33-34 (footnote omitted).

13. H.R. REP. NO. 67, 94th Cong., 1st Sess. 15 (1975).

14. Halper, *Paternalism and the Elderly*, in *AGING AND THE ELDERLY* 321, 325 (1978) (footnote omitted) (emphasis added) [hereinafter cited as Halper].

On another level, status in our society is significantly related to employment. The elderly, often involuntarily unemployed, have lost this status as well. Held captive in a classification he cannot alter, the individual is made to realize the confines of his own powerlessness. The older he gets, the narrower the space in which he may exercise his freedom. As another commentator notes:

[T]he time in an American's life when he is least likely to be unemployed is the decade spanning the years of age twenty-five to thirty-four. From that point on the likelihood of being unemployed leaps at an astonishing rate—by sixteen percent for those aged thirty-five to forty-four, by one hundred and twenty-three percent for those aged forty-five to fifty-four, and by two hundred and seventy-three percent for those aged fifty-five to sixty-four. Although the specific percentages are, of course different, the same trend is observable in government poverty statistics: the older one grows from the same baseline of twenty-five to thirty-four years of age, the greater becomes the likelihood that one will be living in an officially defined state of poverty; indeed, among unrelated individuals residing in urban areas those aged just forty-five to fifty-four are more than twice as likely to be impoverished as those aged twenty-five to thirty-four.¹⁵

McDougal, Lasswell and Chen evoke another image:

Age-based compulsory retirement tends to precipitate or accentuate the syndromes of aging, generating many value deprivations that could otherwise be avoided or mitigated

The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression. The ordinary process of aging aside, the psychosomatic condition of the elderly may be brutally and unduly impaired and exacerbated by the shock of involuntary retirement. Formerly useful skills are consigned to the scrap heap overnight. Access to the accustomed flow of information and other sources of enlightenment are lost or substantially reduced. While the power to vote may continue unaffected, eligibility for office-holding, with minor exceptions, is denied. This implies a concomitant decline in influence upon the making of effective community decisions and a *sharpening sense of powerlessness*. Condemning the elderly to "an idleness that hastens their decline," age-based involuntary retirement tends to affect all personal relations and to evoke "the sorrow of parting, the feeling of abandonment, solitude, and uselessness."¹⁶

Courts add to the stigma by providing their own stereotyping. For example, observe the following description of the elderly discussed in a

15. Stannard, *Growing Up and Growing Old: Dilemmas of Aging in Bureaucratic America*, in *AGING AND THE ELDERLY* 9, 17 (1978).

16. McDougal, Lasswell, & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. FLA. L. REV. 639, 641-42 (1976) (footnotes omitted) (emphasis added).

dissenting opinion in *Franklin v. White Egret Condominium, Inc.*:¹⁷

[A] restriction barring the *residency* of children under 12 [is not] unreasonable, for example, in an elderly retirement community or condominium. Nature itself biologically provides that only younger adults can procreate. It is axiomatic that catabolism in the old results in physical and mental frailties which render them not only incapable of reproduction, but also incompetent to withstand the rough, tumble and noise of rampaging youngsters—inevitable accompaniments to the normal rearing of young children. For this very reason, kids are commonly barred from hospitals. Sick people need peace and quiet and so do old people who lose their erstwhile resilience to turmoil and commotion. Indeed, tranquility is a must for the mental health of older people.¹⁸

Such stereotypes help to cast aging as an illness, and the elderly as the afflicted. Discrimination against the aged appears quite similar to gender based discrimination. It can be said of both that they do not afflict a group underrepresented in the society. The primary press of societal disadvantage comes from the persistence of stereotypes which restrict autonomy. Women, for example, were long bound by the perception that their function was familial, their business acumen slight and their bodies frail. As is true with aging, none of these assumptions were wholly unwarranted. Nonetheless, women have successfully sued to be treated as individuals, to be judged for their own capacities and to be given opportunities related to their specific ability. The principal rationale of U.S. Supreme Court invalidation of gender based discrimination cases has decried reliance on stereotypical positions concerning women. Statutes preferring men to women for appointment as administrators of estates are held unconstitutional not because it is likely that women will have had property management experience comparable to men, but because the stereotype that suggests that they will not is offensive to the equal protection provision of the Constitution.¹⁹

17. 358 So.2d 1084 (Fla. App. 1977).

18. *Id.* at 1091 (Letts, J., dissenting).

19. See *Reed v. Reed*, 404 U.S. 71 (1971). Professor Schuck apparently disagrees. He points out, quite correctly, that the stigma and disadvantage are not isomorphic and illustrates his point by noting "American Jews, for example, are often stigmatized but are not, in conventional terms, a disadvantaged group. American women are often disadvantaged but are not, again in conventional terms, stigmatized." Schuck *Revisited*, *supra* note 8, at 1032. He faults the paucity of my authority for my position that the aged are disadvantaged. Better to understand this point of view, I have conducted a brief and informal empirical study among my Jewish and feminist friends to see whether his illustration is more illuminating to them than it has been to me. I regret to report, they have been of no help. Perhaps Professor Schuck has some authority for his proposition concerning women and Jews.

One would hope that Professor Schuck's demonstration that the aged are not disadvantaged since they enjoy legislative success would not be accepted as an indication of lack of disadvantage for other groups. Racial minorities would lose their status with the Civil Rights Acts, as would women, but then, Professor Schuck believes them not disadvantaged.

Unfortunately, the Supreme Court in *Massachusetts Board of Retirement v. Murgia*²⁰ chose to distinguish the constitutional protection afforded the aged from that afforded women. Nonetheless, whatever the ultimate interpretation of the equal protection clause might be, the stigmatizing effect upon both groups appears to be the principal reason for rejecting Schuck's notion that age discrimination is acceptable as a societal policy.

One must reject Professor Schuck's assertion that the argument against age discrimination is based simply on a claim for a greater portion of public resources. Rather, it seems that the principal claim is simply to individualize treatment and to avoid group discrimination. Individualized programs may be no more beneficial to the elderly than is present law and nothing in anti-discrimination policy necessarily requires affirmative compensation. Indeed, as indicated by one writer, affirmative steps may be counterproductive:

The adoption of Social Security, for instance, was greeted as a great boon to the elderly, and yet it is obvious by now that its blessings have been very mixed. For the assertion of a governmental responsibility to provide for the aged would seem to have permitted the loosening of the bonds of family responsibility and thereby made it easier for persons to neglect their debts to their elderly relatives. It is not quite so hard to shunt them aside, after all, when one believes that the government will take care of them. In addition to hastening the elderly's isolation from their family, Social Security also has encouraged their withdrawal from the economy, for the law severely limits the income that can be earned without incurring a reduction in benefits It is the old story of government beginning by doing things for the individual and ending by doing things to him.²¹

As another example, it is general knowledge that gradual physical deterioration to varying degrees accompanies the aging process. Yet, the age at which one becomes disabled, if one ever does, is not uniform. However, for the purposes of veterans' benefits, Congress has determined that "a person shall be considered to be permanently and totally disabled if such person is sixty-five years of age or older"²² Thus, the generalization now has the force of law.

A further instance of legislative stereotyping concerns the commonly recognized generalization that wage-earning capacity decreases

20. 427 U.S. 307 (1976).

21. Halper, *supra* note 14, at 324.

22. 38 U.S.C. § 502(a) (1976). Professor Schuck claims not to understand how a statute that provides "benefit" to the elderly can be an instance of discrimination. Schuck *Revisited*, *supra* note 8, at 1039. The point has not, however, escaped the Supreme Court. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980).

as age increases. Congress gave this generalization the force of law in legislation dealing with disability payments which provided:

The Secretary, on review under Section 8128 of this title and after a disabled employee becomes 70 years of age and his wage-earning capacity would probably have decreased because of old age aside from and independently of the effects of the injury, may recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable decreased wage-earning capacity.²³

Guardianship laws are a particularly common repository of age stereotyping:

[T]wenty-four of the fifty-one [jurisdictions] refer directly to old age or age-related conditions as grounds for guardianship. None excludes old age as a possible cause, and all are so worded as to permit logical extrapolation to the elderly.

Arizona, California, Colorado, Illinois, Kentucky, Michigan, North Carolina, and Utah refer to "old age;" Delaware, D.C., Kansas, Ohio, Oregon, Virginia, and Wyoming to "advanced age." Nebraska and Nevada cite "extreme old age," and Arkansas, Florida, Iowa, Missouri, and Washington refer to "senility." Pennsylvania restricts definition to "mental infirmities of old age," while Indiana includes both "old age" and "senility." New York's statute refers more generally to "age" as a precipitant of incompetence; Alaska provides for guardianship of "insane persons" including "senile changes" in its definition of mental illness.²⁴

When stereotypes are employed, discrimination necessarily results. As Representative Solarz stated in the House debate on the original ADA: "Clearly, there is no more room for discrimination on the basis of age than there is for religious, racial, sexual or ethnic discrimination."²⁵

23. 5 U.S.C. § 8113(b) (1970). This section was deleted by Pub. L. No. 93-416, § 8, 88 Stat. 1143 (1974).

24. Parmelee, *Protective Services for the Elderly: Do We Deal Competently With Incompetence?*, 2 LAW & POL'Y Q. 397, 403, 416 n.4 (1980). Professor Schuck provides a particularly dramatic illustration of the impact of societal stereotyping when he claims not to understand the significance of the use of age as a factor in conservatorship and guardianship. Schuck *Revisited*, *supra* note 8, at 1039-40. The legal issue in both conservatorship and guardianship is the potential ward's ability to function. That issue can be directly addressed. To address it as a function of age simply provides courts an easy excuse for age discrimination. See Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003, 1009 (1979). California probate was changed to avoid that problem. *Id.* at 1008 n.21.

25. 121 CONG. REC. 9231 (1975). Professor Schuck apparently fails to understand that denying discrimination on the grounds of age necessarily leads to individuation. Schuck *Revisited*, *supra* note 8, at 1037. Also, he confuses a general prohibition against discrimination with the necessity of universal individuation. The Supreme Court has found it possible to approve a variety of affirmative action programs for racial minorities despite its previously universal refusal to accept defenses in cases of intentional racial discrimination. *University of California Regents v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v.*

Although it was enacted in 1975, the Age Discrimination Act was not implemented until June 12, 1979, when HEW issued general governmentwide regulations.²⁶ The ADA requires that regulations consistent with those established by HEW be issued by "each Federal department or agency which extends Federal financial assistance to any program or activity by way of grant, entitlement, loan or contract other than a contract of insurance or guaranty."²⁷ To date, full implementation has yet to be achieved.²⁸

EXEMPTIONS: WHERE AGE DISTINCTIONS ARE PERMITTED UNDER THE ADA

The "Any Law" Provision

Although the purpose of the ADA is to prohibit discrimination on the basis of age, the Act excludes from its coverage certain practices relating to employment²⁹ and certain programs and activities established "under authority of any Law." It is the "any law" exclusion which raises the more significant legal issues. The Act provides:

The provisions of this chapter shall not apply to any program or activity established under authority of any law which (A) provides any benefits or assistance to persons based upon the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms.³⁰

The meaning given to the phrase "any law" is crucial in applying this exclusion for the definition of this phrase determines, to a large degree, the scope of the Act itself. Yet, the importance of precisely defining these phrases seemingly escaped both the House and Senate for the legislative history on this point is exceedingly scarce.

The main references to the "any law" exclusion are found in the Conference Report accompanying the 1975 bill which was adopted and signed into law and in comments accompanying a proposed amendment which passed the House, but ultimately failed of enactment, in 1978. The Conference Report to the 1975 House Bill provides:

In section 304(b)(2), the language of the House bill excluded from

Klutznick, 448 U.S. 448 (1980). Fundamentally, Professor Schuck would prefer to have an Act addressed to specific instances in which a high level of social repugnancy has demonstrably created disadvantage for the elderly. We disagree.

26. 45 C.F.R. § 90 (1980).

27. 42 U.S.C. § 6103(a)(4) (1976).

28. See generally, Marlin, *Enforcement of the Age Discrimination Act of 1975*, 57 CHI. KENT L. REV. 1049 (1981).

29. 42 U.S.C. § 6103(c) (1976).

30. *Id.* § 6103(b)(3).

coverage of this title programs for which the law provides benefits to persons based on such person's age, such as with Social Security. The conferees have expanded this concept so as to exclude, as well, programs for which the law describes intended beneficiaries or target groups in age-related terms without reference to specific chronological age, as in the use of such terms as "older Americans," or "elderly," or "children."³¹

Yet, it is clear that this piece of legislative history simply does not greatly aid in defining the phrase "any law" except to imply the obvious conclusion that federal law, for example Social Security, is at least a part of the "any law" provision.

The 1978 House amendments would have clarified the "any law" provision by amending it to read:

It shall not be a violation of this title, or of any regulation issued under this title, for any person to take any action otherwise prohibited by the provisions of section 303 if, and to the extent that, such action is specifically directed or provided by the terms of a Federal statute, relating to the program or activity involved, which (A) provides any benefits or assistance to persons based on the age of such persons; or (B) establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms.³²

Comments to this amendment reflect that the purpose of this change was to "[c]larify the fact that the Age Discrimination Act in banning 'unreasonable discrimination' in federally assisted programs bans all age based discrimination except that contained in Federal statute[s]."³³ This amendment was deleted in conference;³⁴ it does not follow, of course, that the deletion established the converse of the excised provision.

It is of great significance that the 1978 amendments to the ADA deleted the term "unreasonable" from the Act's statement of purpose "in recognition of the fact that discrimination, by definition, is unreasonable."³⁵ Thus, it may be argued that the deletion of the word "unreasonable" served the same end as the proposed House amendment. As Representative Pepper stated:

One ADA amendment not approved by the conferees . . . would have tightened the allowable exemptions to the act . . . [B]ut, I believe that the deletion of the word "unreasonable" from the act's statement of purpose gives a good indication of how Congress in-

31. H.R. REP. NO. 670, 94th Cong., 1st Sess. 58 (1975).

32. 124 CONG. REC. H3924 (daily ed. May 15, 1978).

33. *Id.* at H3930.

34. See H.R. REP. NO. 1618, 95th Cong., 2d Sess. 87 (1978).

35. 124 CONG. REC. H11451 (daily ed. Oct. 4, 1978).

tends the existing exemptions to be interpreted. The ADA must be viewed as a civil rights statute. As such, exceptions to it must be narrowly construed.³⁶

The question, then, still remains as to the definition of "any law." In the absence of evidence of congressional intent, may it be assumed that the Act was subordinated to state and local law?

Contrary to the approach taken by HEW in its regulations, it seems appropriate to construe the "any law" exclusion so as to limit its application to federal statutes. State and local laws which employ age distinctions could still be justified, if their merit warrants, under one of the Act's other exceptions.

While these exceptions have problems of their own, at least each exception is more limited than the blanket provision excluding all age based criteria from review because of their inclusion in state law. Even at a time in which federal policy appears determined to return control to the states, broader interpretation of the "any law" provision seems an anomaly as it establishes the right of states to contravene federal policy with federal funds. For example, if a federal act providing funds for low income housing left most discretionary decisions to the state, and the state established as a criterion to the use of the funds that recipients be under the age of 65, the "any law" provision would validate the state's discrimination. Federal funds would effectively be barred to the aged. Of course such abuses can be controlled in the provisions granting benefits, but the apparent purpose of the Age Discrimination Act was to provide a generic prohibition against age discrimination that would make individual act-by-act attention unnecessary. The foregoing example is extreme. However, even where state policy is less in conflict with the apparent federal policy, the ability to superimpose state perceptions of appropriate treatment of the aged on federal laws provides the specter of subtle state interference.

The only case to date testing the "any law" provision involved a federal statute which seems inevitably to require use of age-based criteria as it relates to retirement policy. In *Seanor v. United States*,³⁷ the plaintiff complained of a five percent reduction in his civil service annuity under provisions of the Civil Service Retirement Act. The Act required a reduction of benefits for those retiring under the age of 60. Reviewing the age discrimination claim, the court of claims suggested that it was "absurd." Undoubtedly, *Seanor* is a good example of the type of law the exemption was understood to govern. Retirement bene-

36. *Id.*

37. Slip op. May 30, 1980 (Ct. Cl.).

fits for those who choose to retire when they are younger should probably reflect the anticipated longer duration of payments by appropriate scaling down of periodic benefits. That is a far cry, however, from the type of age-based provisions the states might enact given the broad imprimatur of the "any law" exception.

The "Normal Operation" Provision

The normal operation provision of title 42 provides in part:

It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by [this Act] if, in the program or activity involved—(A) such action reasonably takes into account age as a factor necessary to the normal operation . . . of such program or activity.³⁸

Schuck notes that there is only one instance in the Act's legislative history where this provision is mentioned and this is "in the conference report, which simply quoted the exceptions, noting that they modify the prohibition of discrimination 'by considerations of unreasonableness.'"³⁹ However, Schuck argues, "We need not guess at its genesis . . . for it closely parallels the language of the 'bona fide occupation qualifications' (bfoq) exceptions in the ADEA and Title VII."⁴⁰ Schuck examines the two exceptions and ultimately concludes that the ADA exception should be more broadly construed than that of the ADEA. Yet, the opposite conclusion seems to be the more logical choice.

First, the very wording of the ADA exception is more prohibitive than that of the ADEA. The bfoq exception to the ADEA provides that the qualifications must be "reasonably necessary to the normal operation"⁴¹ of the particular business while the ADA exception provides that the activity in question "reasonably takes into account age as a factor necessary to the normal operation"⁴² of the program or activity. Thus, under the ADA exception, a more rigid standard is set—age must be *necessary* to the normal operation, not *reasonably necessary* as under the ADEA. Schuck acknowledges that such textual disparities may justify different interpretations of these two exceptions and admits that such disparities imply "a narrower ambit for the ADA exception

38. 42 U.S.C. § 6103(b)(1)(A) (1976).

39. Schuck, *supra* note 1, at 66 n.200.

40. *Id.* (footnotes omitted).

41. 29 U.S.C. § 623(f)(1) (1975).

42. 42 U.S.C. § 6103(b)(1)(A) (1976).

than for the bfoq exceptions.”⁴³ In fact, he presents no argument based upon this textual difference favoring a broader scope for the application of the ADA exception than for that of the bfoq.

Second, Schuck argues that the phrase “normal operation” is generally more difficult to define “in the context of federally assisted programs than in the context of businesses covered by the ADEA.”⁴⁴ This is so because the purposes of the federal programs are often ill-defined, ambiguous, and undergoing change within the political environment. In contrast, the normal operation of a business, especially in the context of considerations of safety, may be adduced through readily obtainable and objective data. Yet, it is unclear just how this factor militates in favor of broadly construing the ADA exception. The difference between the ADA and the ADEA, between federal programs and businesses, recognized here raises the logical implication that the ADA exception will be invoked with less frequency than the bfoq exception. Certainly, the harder it is to define the normal operation of a federally assisted program, the more difficult it will be to provide the requisite evidentiary justification that an age distinction is necessary to this evasive “normal operation.”

Third, Schuck argues that programs under the ADA, because they are financed with public funds, are more concerned with the equal treatment of individuals than are private employers.⁴⁵ He assumes that separate and different treatment of some age groups may be necessary in order to insure that they are treated equally and that rules employing age distinctions may be required to insure against the risk of unfairness. However, implicit in his assumption is the presumption that the particular needs of an individual may be determined by reference to the general needs of those sharing his same age classification. This presumption, though perhaps not totally lacking in merit, assumes too much for it serves only to reinforce age stereotypes while it de-emphasizes the needs of the individual. It serves to achieve exactly what the ADA was enacted to prohibit.

Finally, Schuck observes the difference in economic incentives between private employers and operators of federally assisted programs.⁴⁶ He argues, in essence, that a private employer has a greater incentive to discriminate against particular age groups than does a program administrator. These observations may be correct, but they remain correct

43. Schuck, *supra* note 1, at 66 n.202.

44. *Id.* at 68.

45. *Id.* at 69.

46. *Id.* at 70.

only so long as the political process remains relatively favorable to the elderly. Public decision making is as subject to the marketplace of political ideas for its survival as is private decision making for its financial objectives. If pressure for funding of programs for the young becomes politically irresistible, one should anticipate that public programs will attempt to find ways to divert funds to accomplish this objective from other available sources including the funds intended for the aging.

The exemption speaks expressly of *necessary* conditions. That would seem to suggest that a provision must be demonstrably unavoidable to qualify. So interpreted, aging would, for example, be a proper consideration in insurance and annuity provisions and perhaps in retirement compensation schemes. It would not be an appropriate condition in those instances in which individual functional tests might substitute.⁴⁷

The "Statutory Objective" Exception

Without explaining their actions, the conference committee that structured the ADA added to the "normal operation" exception a further provision excluding what would otherwise be a prohibited discriminatory action if such action "reasonably takes into account age as a factor necessary to . . . the achievement of any statutory objective" of the program or activity involved.⁴⁸ The committee noted only that the provision was included to "clarify congressional intent"⁴⁹ but did not disclose the exact nature of this intent.

Schuck contends that the statutory objective exception is to be construed broadly. As support for this conclusion, he relies on the unofficial history of the Act and on a comment made by Representative Quie.⁵⁰ The Act's unofficial history, Schuck asserts, reveals that HEW informally urged the conference committee staff to insert this exception "in order to mitigate the potential rigor and narrowness of the normal operation exception."⁵¹ HEW believed the normal operation exception

47. Professor Schuck continues to insist that I would require individuation in all cases despite statements such as those I have just made. He is, of course, correct in pointing out that individuation is almost always possible and, therefore, the use of age classification is never strictly necessary. The Supreme Court may be somewhat more liberal with the notion of necessity for some governmental action perceived to be beneficial. *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (racial factors in admissions necessary for class diversity).

48. 42 U.S.C. § 6103(b)(1)(A) (1976).

49. H.R. REP. NO. 670, 94th Cong., 1st Sess. 58 (1975).

50. See Schuck, *supra* note 1, at 73 & n.230.

51. *Id.* at 73.

alone would not legitimize the solution administrators frequently adopt because of budget constraints which target resources on particular age groups. Representative Quie commented on the permissible use of age-based classifications in such a situation:

Thus, in a bill providing grants for the improvement of reading in the elementary grades, but for which a relatively small sum had been appropriated, the decision could be made to concentrate the effort on the first three grades even though this discriminates against older children. The basis of the decision would be that otherwise the objective of the program would be defeated.⁵²

The conclusion that Schuck draws from the foregoing statement is decidedly incorrect. He asserts that the exception was written with the intent to permit administrators to employ age distinctions based on cost-benefit analysis in order to expend scarce resources on groups most likely to maximize the program benefits, even though this frequently serves to exclude the elderly (because of their lower life expectancy) from participation. He incorrectly states that "[c]ertainly, no contrary intent appears in the legislative history."⁵³

The intent expressed in the legislative history of the ADA makes it clear that cost-benefit analysis is not to provide the basis for age discrimination. Illustrative of this intent is Representative Pepper's comments on the 1978 Amendments:

The ADA must be viewed as a civil rights statute. As such, exceptions to it must be narrowly construed. I am particularly concerned with certain excuses for not serving older people put forth by program managers interviewed by the Civil Rights Commission in preparing its report. They include the so-called cost-effectiveness argument, which asserts that, since it is often more expensive to reach older clients, a program could reasonably conclude that it could concentrate on younger persons. Other managers argue that the existence of age-specific programs, such as the community service employment program for older Americans, justifies other, more general programs, such as those funded under the Comprehensive Employment and Training Act, ignoring the needs of older applicants. [But] these excuses are nothing more than that. The deletion of the word "reasonable" from the [Act's] statement of purpose makes that clear. *Such practices are discriminatory. They will be prohibited under the new amendments.*⁵⁴

In addition to this statement of legislative intent, comments made by HEW in a discussion of the critical issues arising under the Act and its regulations affirm that the statutory objective exception is not to be cir-

52. 121 CONG. REC. 37,299 (1975).

53. Schuck, *supra* note 1, at 75.

54. 124 CONG. REC. H11,451 (daily ed. Oct. 4, 1978) (emphasis added).

cumscribed by cost-effective analysis: "[C]ost-benefit consideration by itself cannot be the sole justification for an exception under" the normal operation or statutory objective clauses.⁵⁵ Furthermore, HEW makes it explicit that the statutory objective exception is to be narrowly construed:

Because legislative history is a broad concept and because statutory objectives will be used to justify the use of administratively imposed age distinctions or factors other than age which have a disproportionate effect, HEW believes that the term "statutory objective" should be construed to mean only expressly stated objectives.⁵⁶

Schuck advocates that the courts should not hesitate to overturn HEW's interpretation. Such an interpretation, he claims, refuses to recognize an objective that is implicit in a statutory provision as well as one which is implicit or explicit in its legislative history.⁵⁷ For these reasons, he concludes that the scope of the exception is unreasonably narrowed by HEW's construction. Unless it is narrowly construed, however, the statutory objective exception could, by itself, render the ADA's prohibition against age discrimination virtually meaningless. Contrary to Schuck's opinion, this prohibition was not simply intended to eliminate arbitrariness in the competition among groups for scarce resources but was meant to eliminate age discrimination regardless of that competition. This point is further evidenced in the language used in the House Proposed Amendment to the statutory objective exception section of the ADA:

It shall not be a violation of this title, or of any regulation issued under this title, for any person to take any action otherwise prohibited by section 303 if, in the program or activity involved, such action is taken to remove barriers to participation in such program or activity by persons of a particular age.⁵⁸

Under a broad interpretation of the exception, program administrators would be free to imply, from the governing statute, any objective necessary in order to justify or authorize their use of age classification. Legislative history could easily be molded by a skillful interpreter to form the basis of any objective the program manager currently desired. Congressional intent, especially the intent to end age discrimination expressed in the ADA, would become a pawn in the administrative quest for an evasive statutory objective. It is neither un-

55. 44 Fed. Reg. 33,774 (1979) (supplementary information to be codified at 45 C.F.R. § 90).

56. *Id.* at 33,773.

57. Schuck, *supra* note 1, at 76.

58. H.R. REP. NO. 1150, 95th Cong., 2d Sess. 124 (1978). This 1978 amendment was adopted in the House, but was ultimately rejected by the House-Senate Conference Committee.

reasonable nor overly strict to require that a statutory objective be expressly stated if it is to be used to justify administratively imposed age distinctions.

"Reasonable Factors Other Than Age" Exception

The third exception to the ADA provides that action otherwise prohibited by the Act is permissible "if, in the program or activity involved, . . . the differentiation made by such action is based upon reasonable factors other than age."⁵⁹ The legislative history of this exception, though not utterly silent, is indeed sparse. The House Conference Report on the House bill mentions the exception in its general discussion of age discrimination:

The provisions in the House bill relating to age discrimination were modeled on title VI of the Civil Rights Act of 1964 . . . but with a significant difference. Distinguishing among individuals on the basis of race for purposes of determining their eligibility to receive the benefits of, or participate in, federally-assisted programs is per se unfair treatment and volative [sic] of the Constitution; in this context, race is an arbitrary distinction. But age may often be a reasonable distinction for these purposes, indeed, the prohibition against age discrimination contained in the House bill excluded cases where age is "a factor necessary to the normal operation of such [federally-assisted] program or activity," or where the "*differentiation * * * is based upon reasonable factors other than age*," or where the program or activity in question "provides any benefits or assistance to persons based on the age of such persons."

What the House bill implies in this regard, the conference substitute makes explicit. The purpose of the title is stated to be the prohibition of *unreasonable* [emphasis in original] age discrimination in federally-assisted programs and activities. The actual prohibitory language of section 303 that is central to this title is modified by considerations of reasonableness, *as the exclusions quoted in the preceding paragraphs make clear*. . . .

The difficulty, obviously, lies in establishing what age-related distinctions are "reasonable" with respect to each federally-assisted program or activity, and on this *there is not a clear consensus among the conferees*.⁶⁰

The obvious difficulty of which the Conference Committee spoke in establishing "what age-related distinctions are 'reasonable'" was never resolved by Congress. However, the above language, indicative of legislative intent, must now be interpreted in light of the 1978 amendments to the ADA. As previously stated,⁶¹ these amendments

59. 42 U.S.C. § 6103(b)(1) (1976).

60. H.R. REP. NO. 670, 94th Cong., 1st Sess. 56 (1975) (emphasis added).

61. See text accompanying notes 31 & 32 *supra*.

restated the purpose of the Act by excluding the word "unreasonable," so that the Act now unequivocally prohibits "discrimination on the basis of age."⁶²

The apparent consequence of the restatement of the purpose of the ADA is to narrow the ambit of permissible activities deleteriously affecting age groups. Thus, the scope of what constitutes a "reasonable factor other than age" under the Act's exception is concomitantly narrowed. That this result is in accordance with congressional intent may be demonstrated by examining the House version of the 1978 amendments to section 304(b)(1) of the ADA.

The proposed House amendment entirely deleted the "reasonable factors other than age" exception from the Act. In its stead, the House submitted the following:

It shall not be a violation of this title, or any regulation issued under this title, for any person to take any action otherwise prohibited by section 303 if, in the program or activity involved, such action is taken to remove barriers to participation in such program or activity by persons of a particular age.⁶³

Thus, the intent of the House was clear—the ADA was to allow classifications based on, or implicating, age distinctions if such classifications were necessary to secure the participation of persons of a particular age in the program or activity involved.

The fact that the House amendment was not adopted does not foreclose the interpretation that the exceptions to the Act should be construed narrowly and made applicable to remedial conduct. Under this reading of the exception, Schuck's fears that a narrow construction "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . ." ⁶⁴ would be dissipated. A narrow construction would not, as Schuck asserts, eliminate the use of factors having differential age-specific impacts but rather would allow such use to eliminate existing discrimination, while ensuring careful scrutiny of the use of such factors in non-remedial contexts. Such a construction totally comports with the purpose and intent of the Act.

Government-wide regulations under the ADA support the argument that the exception is to be construed as suggested. Though the statute provides an exception for "*reasonable* factors other than age," the HEW and other regulations require that the non-age factor must

62. 42 U.S.C. § 6101 (1976).

63. H.R. REP. NO. 1150, 95th Cong., 2d Sess. 124 (1978).

64. Schuck, *supra* note 1, at 79 (quoting *Washington v. Davis*, 426 U.S. 229, 248 (1976)).

bear a "direct and substantial relationship" to the normal operation of a program or activity or to the achievement of a statutory objective.⁶⁵ Contrary to Schuck's view, the standard exacted by the regulations does not contradict the statute, but rather supplements it. Since Congress failed to define "reasonable," the regulators were left to formulate their own standards.

In explaining its choice of the "direct and substantial relationship" standard, HEW asserted:

The regulations adopt the "direct and substantial" standard because it provides the appropriate flexibility and, at the same time, avoids the weaknesses inherent in the "rational" standard. Use of the "direct and substantial" standard means that use of factors other than age must be carefully examined in light of the individual facts and circumstances surrounding their use. This examination will determine whether the use of the factor other than age is a sufficiently effective method of achieving a worthwhile program purpose to justify limiting or denying services or participation to adversely affect persons.⁶⁶

The direct and substantial

relationship requires use of a standard of careful review and examination of uses of factors other than age on a case-by-case basis.

To use a rational relationship or minimum scrutiny standard would leave open the possibility of purposefully circumventing the ADA by allowing administrators to use factors other than age to operate a program when an explicit use of age would be prohibited.⁶⁷

As is true with all provisions of the Age Discrimination Act, there is a dearth of cases interpreting the reasonable factors other than age provision. In *NAACP v. Wilmington Medical Center*,⁶⁸ the court reviewed the legality of a plan to relocate a major portion of the Wilmington Medical Center from its urban to a suburban location. Plaintiff alleged that the relocation violated the Age Discrimination Act. Reviewing the Act, the court found it to be substantially different from other civil rights statutes because of the breadth of its exceptions. It concluded that the non-age related factor exception justified defendant's action even in the face of a less discriminatory feasible alternative:

[W]here the defendant actually adduces some evidence showing that he based his action upon a non-age-related factor that meets the criteria set out in the act and the regulations, he need not also adduce evidence showing that his action was the least discriminatory alterna-

65. 45 C.F.R. § 90.15 (1980).

66. 44 Fed. Reg. 33,774 (1979).

67. *Id.* at 33,783 (comment analysis to 45 C.F.R. § 90.15).

68. 491 F. Supp. 290 (D. Del. 1980).

tive. This interpretation is in accord with the Congressional intent to apply a lesser degree of scrutiny to actions resulting in age discrimination than to those resulting in racial discrimination. Congress intended only to prohibit "*unreasonable* age discrimination."⁶⁹

One would hope the strength of the decision would be somewhat weakened by the fact that the word unreasonable on which the court appeared to place such great reliance had been removed by the 1978 amendment, a fact of which the court took no cognizance.

Fundamentally, the court is correct in noting that Congress has distinguished the Age Discrimination Act from other discrimination legislation. As suggested, it is possible to interpret the exceptions in a way that limits their harm. Congress probably did not intend them to be as harmful as Professor Schuck suggests they might be. It is an inescapable truth, however, that Congress allowed itself to resolve competing policy claims by obfuscating important issues. Ultimately, the elderly must look to Congress to remedy the problem it has created. That was done with the Age Discrimination in Employment Act. It must also be done with the Age Discrimination Act of 1975.

69. *Id.* at 317.

